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No. 94-1070

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GENERAL ELECTRIC COMPANY, et al.,
Petitioners,

v.

PATRICIA INGRAM, et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Petition for Certiorari be denied where all Courts of Appeal, including the Third Circuit, recognize that decisions to admit expert testimony are committed to the discretion of the district courts and thus are to be reviewed for an abuse of such discretion?

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INTRODUCTION

Every Circuit Court recognizes that decisions to admit scientific evidence are committed to the discretion of trial courts. Such decisions are to be reviewed, therefore, for an abuse of such discretion. The Petition for Certiorari rests on a fallacy: that some appellate courts review for "abuse of discretion" while others review for "manifest error." As Respondents, Patricia Ingram, et al.[1], demonstrate below, however, these two terms are used interchangeably to describe the same deferential standard of review. Because it raises a mere matter of terminology, not a split among the Circuits on a matter of substance, the Petition should be denied.

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[1] This brief is filed on behalf of two groups of litigants, referred by the court below as the "'Kohn /Klehr' plaintiffs" (John Ingram, Sr. in his own right and for Patricia Ingram, deceased; April Ingram Robinson-Ray; John Ingram, Jr.; Mabel Brown; George Burrell, Priscilla Etheridge Burrell, in their own right and as parents and natural guardians of Amber Shardai Burrell, a minor; Priscilla Etheridge Burrell, as parent and natural guardian of Monica Hilton, a minor; Wallace D. Cummins; K. Louise Jones, in her own right and as Administratrix of the Estate of Harvey N. Jones, Jr., deceased; James Lament; Mary Knight; William Butler; Theresa Butler; Marvin Simpson; Alan Simpson; Karen Simpson; Donald Simpson; Brian Jackson; Bessie Cunningham, in her own right and as representative of Matthew Cunningham) and the "'Hanes' plaintiffs" (Christopher S. and Jacqueline M. Brown; Cathlene Brown; Craig A. Brown; Catherine D. Brown; Mary Retta Johnson; Margherita Barbetta; Celeste Brown, Clemmon L. Brown, Cloyd Brown, and Curtis Brown). *See In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 736 (3d Cir. 1994) (hereafter, *Paoli II*).

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case contains misstatements and omissions.[2] Respondents adopt by reference the statement of facts in the opinion presented for review and emphasize the following:

1. These consolidated actions were commenced in 1986 on behalf of 38 people who live adjacent to the Paoli Railroad Yard (the "Yard") to recover for personal injuries and property damage caused by polychlorinated biphenyls ("PCBs") and other related transformer fluid toxins, including PCDFs ("furans") and PCDDs ("dioxins"). These chemicals were used, leaked, spilled, and discharged at the Yard for more than thirty years. Most related claims (*i.e.*, those of more than 250 other individuals arising from the same PCB contamination of the Yard) are pending in Pennsylvania state court, *In re Paoli Railroad Yard PCB Litigation*, Civil Action No. 92-08542 (CCP Chester County). A class-wide settlement with one defendant has been approved under Pennsylvania class action rules.

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[2] For example, the Certiorari Petition states (at 3) that Respondents offered the opinions of two physicians and one physicist at the *in limine* hearing. This disregards the testimony of a chemist found to be persuasive by the Third Circuit, *Paoli II*, 35 F.3d at 778, the opinions of a chemical engineer and real estate expert as to whom Petitioners' motions in limine were denied, and the voluminous documentary evidence offered in support of the disputed expert opinions.

2. Virtually every major industrialized nation, including the United States, has banned or severely restricted the manufacture, sale, and use of PCBs.[3] Thus, in this case, it is the conclusions of Petitioners' experts which are at odds with those consistently reached by courts, legislatures, and pertinent administrative agencies. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995 U.S. App. LEXIS 12 at *21 n.9 (9th Cir. Jan. 4, 1995) (the FDA continues to approve Bendectin for use by pregnant women and it is still widely used in this fashion abroad).

3. The Paoli Railroad Yard is a part of a notorious Superfund site,[4] once described by the National Institute for Occupational Safety and Health (NIOSH) as having the worst PCB contamination ever encountered during a health

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[3] The Toxic Substances Control Act ("TSCA") focuses primarily on PCBs and bans, *inter alia*, their manufacturer. *See* 15 U.S.C. §2605(e). TSCA was supported by unequivocal findings, such as: "[1] PCBs have been found... to cause severe skin and liver problems in humans.... [and] [2] [t]here is no dispute over their toxicity to wildlife and to humans." 122 Cong. Rec. 8281 (1976). *See also Environmental Defense Fund, v. EPA*, 598 F.2d 62, 65-66, 84 n.78 (D.C. Cir. 1978) (PCBs are extremely toxic to humans and are suspected of causing a significant share of health and ecological problems) (*quoting* the Sixth Annual Report of Council on Environmental Quality 108 (1975)); *accord Matter of Quanta Resources Corp.*, 739 F.2d 912, 913 n.1 (3d Cir. 1984), *cert. granted* 469 U.S. 1207 (1985), *aff'd*, 474 U.S. 494 (1986); *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1270 (D.C. Cir. 1980).

[4] The EPA Site includes the 28 acre railroad yard and the adjacent watershed in which Respondents reside. (A6127).

inspection. (A4046). It is located at the crest of a hill; the Respondents live downgradient from it in the area identified by the Environmental Protection Agency (EPA) as having experienced the most severe PCB runoff. (A6204).

4. In 1992, six years after completing emergency remediation work and almost a decade after PCBs were removed from nearby trains, the EPA determined that PCBs were *still* found at the Yard and Respondents' homes at dangerous levels. Thus, in its July 1992 Record of Decision (ROD) regarding the Paoli Site, the EPA ordered further remedial actions, including: (1) reducing the level of PCBs in soil at the Yard to 25 parts per million ("ppm"), (2) reducing the level of PCBs in residential soils to 2 ppm, (3) erecting new erosion controls to reduce water runoff from the Yard to Respondents' homes, and (4) creating deed restrictions to prohibit any residential or agricultural use of the Yard. (A6123-25). Although EPA submits that these actions, when completed, will reduce "excess cancer risks" to acceptable levels, it acknowledges that hazardous substances will be left on site "above health-based levels." (A6125).

5. In the decision now presented for review, *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) (hereafter, *Paoli II*), the Third Circuit stated no fewer than **sixteen times** that it would only reverse those decisions of the trial court which constituted an "abuse of discretion." *See infra* §B3. Using this deferential standard, most of the district court's evidentiary

decisions were affirmed. The same cannot be said of the first series of evidentiary rulings (and grants of summary judgment) in these cases. *See In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (hereafter, "*Paoli I*").[5]

REASONS FOR DENYING THE WRIT

A. These Actions Are Not Ripe For Review

Because there has not been a final disposition in this matter and it has been remanded for further proceedings, it is not ripe for review by this Court. *See, e.g., Brotherhood of Locomotive Fireman v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967); *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

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[5] In *Paoli I*, the Third Circuit concluded that the district court abused its discretion repeatedly, first, by failing to conduct an adequate "factual inquiry" into the disputed issues of scientific reliability. *Paoli I*, 916 F.2d at 836, 853. Indeed, the trial judge granted defendants' motions *in limine* without so much as oral argument and then failed to articulate his reasons for doing so. *Id.* Moreover, the district court abused its discretion by insisting on a "certain kind of degree or background" for Respondents' experts, *id.* at 855-56, making "credibility judgments," *id.* at 858, insisting that scientific evidence not "peer reviewed" was inherently unreliable, *id.*, and entering an unduly restrictive "case management order" which, *inter alia*, denied Respondents an opportunity to discover Petitioners' experts' positions. *Id.* at 854.

The Third Circuit has remanded this matter, for a second time, for trial. At trial, some but not all of the expert testimony at issue may be offered, and it may or may not be accepted by the jury. This case, which has already been in suit for almost nine years, thus may be resolved in a number of ways that will render moot the decisions about which Petitioners complain. Moreover, as shown below, no conflict of authority exists which might justify this Court's intervention at this time.

B. No Conflict of Authority Exists To Merit This Court's Review Of The Third Circuit's Decision.

While this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), did not comment upon the well-established rule that evidentiary decisions are committed to trial judges' discretion, the Petitioners argue that it has somehow engendered three disparate standards among the Circuits.[6] More particularly, Petitioners argue that in the wake of *Daubert* the First, Second, Fifth, Sixth and Seventh Circuits reverse only for "manifest error." *See* Petition For A Writ of Certiorari at 12-13. Conversely, the Fourth, Eighth, Ninth, Tenth and D.C. Circuits purportedly apply what Petitioners call a "simple" abuse of discretion standard, *id.* at 13, while the Third Circuit, in the decision presented

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[6] Though preceding *Daubert*, Petitioners made the same argument as they do now in their unsuccessful 1990 Certiorari Petition. *See General Electric Co., et al., v. Knight, et al.*, Reply In Support of Petition for a Writ of Certiorari, at 6, No. 90-1309 (Oct. Term 1990) (the Third Circuit failed to apply the so-called "clearly erroneous" standard of review).

for review, applied what Petitioners must regard as a "complex" abuse of discretion standard of review.[7]

As Petitioners must acknowledge, all Circuits recognize that evidentiary decisions are committed to trial judges' discretion. Thus, they are to be reviewed for an abuse of that discretion. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Contrary to Petitioners' argument, there is no practical difference between the "abuse of discretion" and "manifest error" terms used to describe the deferential standard of review given trial judges' evidentiary decisions. *See, e.g., Hamling v. United States*, 418 U.S. 87, 108 (1974) ("abuse-of-discretion" standard); *Salem v. United States Lines*, 370 U.S. 31, 35 (1962) ("clearly erroneous" standard); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1990) (citing *Salem* as requiring an "abuse of discretion" standard), *cert. denied*, 112 S.Ct. 163 (1991).[8] *See*

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[7] Although they do not so state, Petitioners apparently view the so-called "simple" abuse of discretion standard as less deferential than the "manifestly erroneous" standard which they prefer.

[8] Indeed, some opinions define an abuse of discretion as a "clear" or "manifest" error. *E.g., Sage Realty Corp. v. Insurance Co. of North America*, 34 F.3d 124, 128 (2d Cir. 1994) (evidentiary "determinations will not be reversed in the absence of an abuse of discretion amounting to manifest error"); *United States v. Hauert*, 1994 U.S. App. LEXIS 31882 *13 (7th Cir. 1994) (finding "no abuse of discretion, no clear error" in preclusion of lay opinion testimony); *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir. 1990) (admission of expert testimony is reviewed for "abuse of discretion" and sustained unless "clearly erroneous"), *cert. denied*, 498 U.S. 1093 (1991); *National Metal Finishing Co., Inc. v. Barclays American/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990) ("abuse of discretion" found if

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generally 1 S. Childress & M. Davis, *Standards of Review* §4.2 at 233 (1986) (review of expert testimony decisions for manifest error "appears to work out to an abuse of discretion test").[9] Indeed, as demonstrated below, the "abuse of discretion" and "manifest error" terms are used in all Circuits, often interchangeably, to illustrate that every possible error made by a trial court in admitting or excluding evidence need not be reversed. *See infra* pp. 9, 12, 16-17.[10]

1. The Courts Which Purportedly Apply A "Manifestly Erroneous" Standard Actually Review For An Abuse of Discretion.

Petitioners erroneously argue that the First, Second, Fifth, Sixth and Seventh Circuits review for "manifest

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[8](...continued)
a decision is "clearly erroneous"); *United States v. Ortiz*, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986) ("abuse of discretion" found if decision is "clear error").

[9] *Compare* 22 Wright and Graham, *Federal Practice and Procedure*: Evidence §5166, at 28 (1994 Supp.) (trial judges' evidentiary decisions are reviewed for an "abuse of discretion") *with* 3 *Weinstein's Evidence* ¶702[2], at 702-22 to 702-23 (1994) (trial judges' evidentiary decisions are reviewed for "manifest error").

[10] *See, e.g., Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) (contrasting simply evidentiary error with an "abuse of discretion"); *cert. denied*, 114 S. Ct. 1844 (1994); *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1434 (5th Cir.) (contrasting the admission of expert testimony assumed *arguendo* to have been in error with an evidentiary decision that is "manifestly erroneous"), *cert. denied*, 493 U.S. 935 (1989).

error," not an "abuse of discretion." *See* Petition For A Writ of Certiorari (hereafter, "Petition"), at 12-13.

The first decision which, according to Petitioners, exemplifies the "manifestly erroneous" line of cases is *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993). Of pertinent concern there was whether the trial court's **concededly erroneous** denial of a motion *in limine* constituted reversible error.[11] In resolving **this** question, the court emphasized that trial judges have "substantial discretion" in connection with the admission of opinion evidence and, thus, their rulings are upheld unless "manifestly erroneous." *Id.* at 1183, *quoting Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). That *Sepulveda* did not announce a standard of review different from the "abuse of discretion" standard is apparent when one examines the four Fed.R.Evid. 702 cases on which the court relied, *see* 15 F.3d at 1184: (1) *United States v. Angiulo*, 897 F.2d 1169, 1189 (1st Cir.) (the district court did not abuse its discretion in permitting expert testimony as to defendants' roles in a poker operation), *cert. denied*, 498 U.S. 845 (1990); (2) *United States v. Ladd*, 885 F.2d 954, 960 (1st Cir. 1989) (district court "acted well within its discretion" in permitting expert testimony regarding the "idiom and workings of the heroin community"); (3)

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[11] The prosecution in *Sepulveda* sought to introduce the testimony of a police commander with regard to the defendant's intent to distribute drugs. After a related motion *in limine* was denied, the police commander began to testify. Cross-examination revealed, however, that his testimony was highly speculative. Accordingly, the trial court granted a motion to strike his testimony and instructed the jury in language described as "firm, clear, and to the point" to disregard the commander's testimony in its entirety. 5 F.3d at 1182-83.

United States v. Angiulo, 847 F.2d 956, 975 (1st Cir. 1988) (the district court did not "abuse its discretion" in admitting FBI agent's testimony about defendants' relationships with a criminal organization); *cert. denied*, 488 U.S. 852 & 488 U.S. 928 (1988); (4) *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987) (court did not "abuse [its] discretion" in permitting agent to testify as a DEA expert on the practices and idiom of the cocaine community).[12]

Petitioners' argument that the Second Circuit applies a "manifestly erroneous" standard is based upon *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), *cert. denied sub nom. Creaciones Viviana Ltda. v. United States*, 114 S.Ct. 1294, 1295, 1538 (1994). Primarily concerned with the constitutionality of certain warrantless seizures, this opinion quickly resolved the only evidentiary dispute before it: whether opinion testimony from someone identified only as a fact witness constituted unfair surprise. In response, the Second Circuit simply noted, "Judge Weinstein's determination that this testimony would help the jury was neither 'manifestly erroneous' nor a 'clear abuse of discretion.'" *Id.* at 58. As in the First and every other Circuit, these terms are used interchangeably in the Second Circuit. *See, e.g., United States v. Aminy*, 15

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[12] *See also Williams v. Poulos*, 11 F.3d 271, 282 (1st Cir. 1993) (abuse of discretion is the standard); *United States v. Echeverri*, 982 F.2d 675, 680 (1st Cir. 1993) ("manifest abuse of the trial court's discretion"); *Apostol v. United States*, 838 F.2d 595, 599 (1st Cir. 1988) (finding no "abuse of discretion" after quoting "manifestly erroneous" language from *Salem*); *Forbro Design Corp. v. Raytheon Co.*, 532 F.2d 758, 762 (1st Cir. 1976) (citing *Salem* for the proposition that the appropriate standard of review is an "abuse of discretion").

F.3d 258, 261 (2d Cir. 1994) (trial court's decisions to admit testimony under Fed.R.Evid. 702 will be upheld absent "manifest error or abuse of discretion").[13]

Petitioners' argument that the Fifth Circuit applies a "manifestly erroneous" standard is based upon *Rosado v. Deters*, 5 F.3d 119 (5th Cir.1993), *quoting Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (en banc; applying *Frye*), *cert. denied*, 112 S.Ct. 1280 (1992). While both of these cases contain "manifestly erroneous" language, both applied an abuse of discretion standard of review. *See Rosado*, 5 F.3d at 124 (no "abuse of discretion" in excluding accident reconstructionist's opinion because he could not identify its physical or mathematical bases); *Christophersen*, 939 F.2d at 1115 (trial court had not "abuse[d] its discretion" in excluding unreliable medical testimony).[14]

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[13] *See also United States v. Quiroz*, 13 F.3d 505, 513 (2d Cir. 1993) (no abuse of discretion found in admitting expert report); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1210 (2d Cir. 1993) (a "manifestly erroneous" evidentiary decision *is* an abuse of the trial court's discretion); *United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992) (reviewing for an abuse of discretion means that "clearly erroneous" evidentiary decisions are to be reversed). *See generally Sage Realty Corp. v. Insurance Co. of North America*, 34 F.3d 124, 128 (2d Cir. 1994) (evidentiary determinations are upheld absent "an abuse of discretion amounting to manifest error").

[14] *See also Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994) (trial judge's decision to admit expert testimony is reviewed for an abuse of discretion) (*reh'g en banc denied*, 26 F.3d 1117); *Marcel v. Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994) (same); *Arleth v. Freeport-Moran Oil & Gas Co.*, 2 F.3d 630, 635 (5th Cir. 1993) (same) (*reh'g denied*, 9 F.3d 105). *See generally Davidson Oil*

(continued...)

Petitioners' argument that the Sixth Circuit applies a "manifestly erroneous" standard is based upon *United States v. Bonds*, 12 F.3d 540, 544 (6th Cir. 1993), and *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1014 (6th Cir. 1993), two decisions in which the appellate court was presented with admitted or assumed evidentiary mistakes and therefore emphasized the "manifestly erroneous" language of *Salem*, 370 U.S. at 35. In *Bonds*, DNA evidence had been admitted by the district court under the *Frye* standards that were subsequently rejected in *Daubert*. 12 F.3d at 554-555. The court refused to reverse the underlying criminal conviction because this admittedly irregular evidentiary ruling did not constitute "manifest error." *Id.* at 554. At the same time, the court stated the general rule: "We review the trial court's admission of testimony and other evidence under an abuse of discretion standard." *Id.* Likewise, in *Cantrell*, the court refused to overturn a judgment based in part on a doctor's personal observations linking laryngeal cancer to asbestos. 999 F.2d at 1012-13. Even if this testimony were erroneously admitted, it did not constitute "manifest" error. *Id.* at 1014. At the same time, the standard of review is that a "trial court's exercise of discretion" will not be disturbed. *Id.*[15]

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[14](...continued)
Country Supply v. Klockner, Inc., 908 F.2d 1238, 1245 (5th Cir. 1990).

[15] *See also United States v. Howard*, 1994 U.S. App. LEXIS 31536 (6th Cir. Nov. 8, 1994) (admission of expert testimony "is

(continued...)

Petitioners' argument that the Seventh Circuit applies a "manifestly erroneous" standard of review is based upon *Mars v. United States*, 25 F.3d 1383 (7th Cir. 1994), a personal injury action brought under the Federal Tort Claims Act. The Seventh Circuit affirmed a decision (made by a magistrate judge) that the plaintiff's neck injuries were pre-existing, not suffered in a collision with a postal vehicle. In response to appellant's argument that this finding was based on unreliable expert evidence, Judge Posner clarified the "mistaken dictum" in *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993), which appeared to state that courts of appeal review trial judges' evidentiary decisions *de novo*. *Mars*, 25 F.3d at 1384. Instead, trial judges' evidentiary decisions are not reversed unless "clearly erroneous." *Id.* Pertinent Seventh Circuit jurisprudence equates such an error with an abuse of discretion. *See, e.g., Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) (per Posner, J.) (new trial warranted because certain evidentiary errors were not "harmless" but, as to others, including medical testimony challenged under *Daubert*, the "judge [did not] abuse[] his discretion"); *cert. denied*, 114 S. Ct. 1844 (1994).[16]

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[15](...continued)
reviewed for abuse of discretion"); *United States v. Nallie*, 1994 U.S. App. LEXIS 230 (6th Cir. Jan. 6, 1994) (same); *Liggons v. Roehm Gmbh*, 1993 U.S. App. LEXIS 1335, *9 (6th Cir. Jan. 20, 1993) (same). *See also United States v. Bolton*, 1994 U.S. App. LEXIS 4888, *6 (6th Cir. March 15, 1994) (describing standard as both "manifest error" and abuse of discretion, holding no such abuse existed).

[16] *See, e.g., Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir. 1992) (abuse of discretion review given to decisions to admit or

(continued...)

2. Those Circuits Which The Petition Acknowledges Apply An Abuse of Discretion Standard Also Employ "Manifestly Erroneous" Terminology.

Though Petitioners' recognize that the Fourth, Eight, Ninth, Tenth and District of Columbia Circuits apply an "abuse of discretion" standard of review, they erroneously suggest that this standard conflicts with the decisions reviewed in §1 above. Yet, in each of the following decisions, the court reviewed the admission or exclusion of expert testimony under an "abuse of discretion" standard while also quoting the "manifestly erroneous" language of *Salem v. United States Lines*, 370 U.S. 31, 35 (1962).[17]

In the Fourth Circuit, *see, e.g., United States v. Grandison*, 780 F.2d 425, 433 (4th Cir. 1985); *United States v. MacDonald*, 688 F.2d 224, 228 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983).

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[16](...continued)
exclude expert testimony). *See also Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir. 1994) (because trial court has broad discretion in admitting expert testimony, its decisions will only be reversed if "manifestly erroneous"; admission of non-expert testimony is likewise reviewed for an abuse of discretion; here, any error in allowing doctors to testify was "harmless").

[17] *See also General Ill. Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 1409 n.2 (Fed. Cir. 1994) (district court's decision to admit or exclude expert testimony are not disturbed absent an abuse of discretion); *Evans v. Mathis Funeral Home, Inc.*, 996 F.2d 266 (11th Cir. 1993) (same).

In the Eighth Circuit, *see, e.g., United States v. Bartley*, 855 F.2d 547, 551 (8th Cir. 1988); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 919 (8th Cir. 1986).

In the Ninth Circuit, *see, e.g., United States v Rahm*, 993 F.2d 1405, 1418 (9th Cir. 1993); *Rogers v. Raymark Industries, Inc.* 922 F.2d 1426, 1429, 1431 (9th Cir. 1991).

In the Tenth Circuit, *see, e.g., United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 647 (10th Cir. 1991).

In the District of Columbia Circuit, *see, e.g., Coleman v. Parkline Corp.*, 844 F.2d 863, 866 (D.C. Cir. 1988); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir. 1987) *cert. denied*, 484 U.S. 817 (1987). *Cf. Morgan v. District of Columbia*, 824 F.2d 1049, 1069 (D.C. Cir. 1987) (whether expert testimony was required to prove case also is a matter left to court's discretion; it and related decisions are sustained unless "clearly erroneous").

3. As Demonstrated In The Decision Below, The Third Circuit Also Applies An Abuse Of Discretion Standard.

In the decision presented for review, the Third Circuit stated and repeatedly demonstrated that evidentiary decisions are reviewed for an abuse of discretion -- the same standard applied in *all* other circuits. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 749-50 (3d Cir. 1994). Thus, most of the trial court's determinations were upheld, including some thought to be erroneous. For example, while litigants **should** be permitted to depose

opposing experts who testify at *in limine* hearings, the Third Circuit "conclude[d] that the district court [ha]d not abuse[d] its discretion in allowing experts, who had provided affidavits, to testify at the *in limine* hearing without being deposed." *Id.* at 739. Further, with regard to each of its other holdings under Fed.R.Evid. 403, 702 or 703, the Third Circuit made clear that it was reviewing only for abuses of the trial judge's discretion.[18]

The Third Circuit carefully reviewed the support for, and criticisms of, the opinions of Doctors Sherman and DeGregorio in order to determine whether the district court "abused its discretion" in concluding that their causation methodologies were unreliable. *Id.* at 757-58, 759, 785. Ultimately, the court concluded that the district court had "abused its discretion" in excluding those opinions of these doctors which were based on "standard diagnostic techniques" or which reasonably rebutted defense experts' causation theories. *Id.* at 760. Conversely, "the district court acted within its discretion" in excluding causation opinions thought to be based on litigant self-reporting. *Id.* at 762. The net effect of this explicit "abuse of discretion" standard of review was to *affirm* the exclusion of most of the causation evidence offered in support of Respondents' present bodily injury claims. *Id.* at 766-67, 771.

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[18] *See also DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 944 (3d Cir. 1990) (abuse of discretion is general standard); *Arnold v. Loose*, 352 F.2d 959, 962 (3d Cir. 1965) (trial judge did not "exceed his discretion" or make a "clearly erroneous" evidentiary decision).

Even with regard to the trial judge's inexplicable conclusion that one of the nation's leading PCB experts, Ian C.T. Nisbet, Ph.D.,[19] was unqualified to testify, the Third Circuit "defer[ed] to the district court." *Id.* at 773. Thus, when it considered "whether the district court [had] acted within its discretion," *id.* at 777, in excluding the results of Eco-Logic, a laboratory on whose data Dr. Nisbet had relied,[20] the Third Circuit *observed* that the laboratory's methodology was essentially unchallenged and that one of its chemists had "provided a fairly convincing defense of [its] quality control measures" but *held* that the district court "acted within its discretion" in excluding the laboratory's results. *Id.* at 778. *Cf. Bonds*, 12 F.3d at 554-555 (purported errors by laboratories are generally left for the jury to resolve).

The Third Circuit noted that a similarly close call was presented regarding the admissibility of evidence of furans and dioxins, chemicals undoubtedly present at the

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[19] EPA's PCB effluent standards, 42 Fed. Reg. 6532 (1977), were promulgated and upheld in large part on the basis of Dr. Nisbet's work. *See Environmental Defense*, 598 F.2d at 89 (relying upon the "Criteria Document" prepared by Dr. Nisbet which surveyed, at EPA's request, the scientific literature on PCBs). Like the EPA and the D.C. Circuit, the Third Circuit has recognized Dr. Nisbet to be "an extremely well qualified" expert. *Paoli II*, 35 F.3d at 774; *see also id.* at 771. Nevertheless, the district court "provide[d] *no* justification" for excluding the vast majority of Dr. Nisbet's opinions. *Id.* at 778 (emphasis added).

[20] The EPA also relies upon Eco-Logic to do PCB-related work and has engaged it to provide Bay City, Michigan with a thermochemical reactor designed to incinerate PCBs. *See The Philadelphia Inquirer*, Oct. 6, 1992 at F1.

Paoli Railroad Yard and indisputably created when PCBs are over-heated. (A4020). Nevertheless, the Third Circuit held "that the district court acted within its discretion in excluding this evidence under [Fed.R.Evid.] 403." *Paoli II*, 717 F.3d at 783.

Likewise, the Third Circuit upheld the district court's exclusion of two human poisoning episodes involving PCBs (the Yusho and Yu Cheng incidents) "as substantive evidence," *id.* at 765, even though it noted that one of the Petitioners' experts has testified that the Yusho incident was among "the biggest developments" in the history of the scientific investigation of PCBs. *Id.* at 784. More particularly, the Third Circuit "h[e]ld that the district court was within its discretion" in excluding this clearly relevant evidence under Fed.R.Evid. 403. *Id.* at 784.

The Third Circuit also instructed, as have other Circuits since *Daubert*[21], that while deferential, the abuse of discretion standard of review is not toothless. Indeed, particularly when they are based on a scientific record that may be reviewed on appeal as readily as by the trial judge, and when they are tantamount to grants of summary judgment, evidentiary exclusions must be carefully scrutinized (*i.e.*, given a "hard look") so as to guard against the types of abuses of discretion which the trial court has repeatedly committed in this matter. 35 F.3d at

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[21] *See Daubert v. Merrell Dow Pharmaceuticals*, 1995 U.S. App. LEXIS 12, at *8 (9th Cir. Jan. 4, 1995) (abuse of discretion standard is to be applied).

733, 750.[22] Such a prudent guideline is to be expected from Judge Becker. It is praiseworthy, not "certworthy."

Petitioners' failure to acknowledge the Third Circuit's *repeated* references to the Third Circuit's "abuse of discretion" standard is troublesome. Petitioners have either misrepresented the decision below or mean to assert that the Third Circuit simply did *not* do what it repeatedly stated it was doing, *i.e.*, reverse those trial court decisions which constituted an abuse of discretion. In order to test this latter assertion, it would be necessary for this Court to repeat the detailed review of scientific testimony ably conducted by the Third Circuit.[23] The result of this time-consuming process would be unjustifiable delay and an entirely fact-bound opinion.

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[22] Carefully reviewing for an abuse of discretion is completely consistent with many comparable decisions. *See, e.g., Simon v. Shearson Lehman Bros.*, 895 F.2d 1304, 1310 (11th Cir. 1990); *EEOC v. State of Delaware DHSS*, 865 F.2d 1408, 1413 (3d Cir. 1988); *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 179 (1st Cir. 1988); *Rosenfield v. Wellington Leisure Prods.*, 827 F.2d 1493, 1498 (11th Cir. 1987); *deMars v. Equitable Life Assur. Soc. of U.S.*, 610 F.2d 55, 64-65 (1st Cir. 1979); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 438 (3d Cir.), *cert. denied*, 404 U.S. 8981 (1971).

[23] Thus, while it purports to relate to a single legal issue, most of the content of the instant Certiorari Petition is devoted to Petitioners' novel views about the harmfulness of PCBs, and the competence of any expert who would dare to voice a contrary opinion.

This Court's opinion in *Daubert* is not yet two years old. Although there is, as we have shown, no conflict among the Circuits on the appropriate standard of review to apply to district courts' decisions excluding scientific expert testimony, it would in any event be too early for this Court to grant certiorari to resolve any such incipient conflict, even if there were one. The better course would be for this Court to allow the Circuits adequate time and experience in applying *Daubert* in a variety of factual settings. If a true conflict does develop after such experience, there will be no shortage of suitable opportunities for the Court to grant review to resolve it.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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DATED: January 13, 1995

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GENERAL ELECTRIC COMPANY, et al.
Petitioners,

v.

PATRICIA INGRAM, et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I certify that I have this 13th day of January , 1995, caused three copies of the Petition for a Writ of Certiorari in this case to be deposited in the United States mail, first-class postage prepaid, addressed to each of the following:

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